IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. _____

FLORENCE E. SMITH,
Administratrix of the Estate of
ROBERT SMITH, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC CO.,
a corporation,

Respondent.

PETITION FOR WRIT
OF CERTIORARI
(To the Court of Appeal of the State
of California, First Appellate District,
Division Three)

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PETITION FOR WRIT
OF CERTIORARI
(To the Court of Appeal of the State
of California, First Appellate District,
Division Three)

The petitioner, plaintiff-appellant Florence E. Smith, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, which judgment and opinion became final upon denial of a hearing by the California Supreme Court on December 23, 1971.

a. Opinions Below

The California Supreme Court did not render any opinion, upon denial of petitioner's Petition for a Hearing. A copy of said denial by the California Supreme Court is annexed hereto as Appendix A. A copy of the opinion of the Court of Appeal of the State of California, certified for non-publication, is annexed hereto as Appendix B. A copy of the opinion and order of the trial court, the Superior Court of the State of California in and for the County of San Francisco, is annexed herein as Appendix C. A Petition for Rehearing was made to the California Court of Appeal, First Appellate District, Division Three, which was denied on November 15, 1971, without modification of the opinion of said Court. A copy of said denial is annexed hereto as Appendix D. None of the foregoing opinions are published in any official or unofficial reports.

b. Grounds of Jurisdiction of This Court

i. The order of the California Supreme Court denying petitioner's Petition for Hearing, copy of which is annexed hereto as Appendix A, was filed December 23, 1971. The California Supreme Court has discretion as to whether or not to hear such petitions.

California Constitution, Article 6, §12. Upon denial by the California Supreme Court of the Petition for Hearing, the judgment of the California Court of Appeal became the final judgment of the highest Court of California in which a judgment or decision could be had. Where a Petition for Hearing is denied by the California Supreme Court, there is no provision permitting a Petition for Rehearing in said Court.

ii. Jurisdiction is invoked under sub-division 3 of 28 U.S.C. §1257, which reads, in pertinent part, as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "* * *
>
> "(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States."

As pointed out above, the final action of the State Courts was the filing of the denial of hearing by the California Supreme Court on December 23, 1971 (Appendix A), and this petition was filed within 90 days of that date. 28 U.S.C. §2101(c).

c. Questions Presented for Review

1. In an action under the Federal Employers Liability Act, 45 U.S.C. §§51, et seq., may the verdict of the jury be set aside, and a judgment notwithstanding the verdict granted to the defendant railroad where there was substantial evidence that defendant was negligent in exposing its employee to harm from negligent third-parties and where there was substantial evidence that the exposure of said employee could feasibly have been avoided?

2. In such an action, was the California Court of Appeal correct in holding that, as a matter of law, it was not "particularly hazardous" (Appendix B at p. 6) for defendant to require its employees to walk continuously back and forth, in the dark of night, across a poorly lit public street and highway open for vehicular traffic? Was not the question of hazard one peculiarly for resolution by the jury in an action under the Federal Employers Liability Act?

3. In such an action, was the California Court of Appeal correct in holding that, as a matter of law, the defendant railroad was not negligent in failing to take feasible steps to eliminate the need to cross said street and in failing to furnish, or require equipment that would have made its employees more visible to third

party motorists?

4. Under the Federal Employers Liability Act, was the State Courts' action in depriving plaintiff of a jury trial proper and correct?

5. In an action under the Federal Employers Liability Act, may the trial court order a new trial by application of the state criteria for granting such a new trial, or does the federal criteria apply in determining when a jury verdict may be set aside and a new trial granted?[1]

d. Statutory Provisions Involved

The statutory provision involved is 45 U.S.C. §51. Jurisdiction of the federal

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[1] As will be seen, this question was deemed moot by the California Court of Appeal, because the judgment notwithstanding the verdict was held properly granted. Under California practice, an order granting a new trial is an appealable order (California Code of Civil Procedure §904.1 [d]), and, as such, becomes final if not appealed from immediately. See California Code of Civil Procedure §906.

claim by the State Courts is provided in 45 U.S.C. §56. The text of said provisions is set forth in Appendix E.

STATEMENT OF THE CASE

As noted, this action was brought by petitioner under the Federal Employers Liability Act, 45 U.S.C. §§51, et seq., and the federal question involved herein was raised in the complaint (Cl. Tr. 1-7), copy of which is annexed hereto as Appendix F (see Appendix F at p. 4), and in all of the subsequent proceedings. The opinions of the Court of Appeal and of the trial court, Appendices B and C respectively, similarly establish that the sole questions involved herein are with respect to the proper and uniform interpretation and application of the aforesaid statutes of the United States.

Petitioner is the administratrix of the Estate of Robert Smith. Mr. Smith was killed during the course of his employment with defendant railroad (e.g., Opinion of California Court of Appeal, Appendix B, pp. 1-2). The jury herein, by an 11-1 vote (Rep. Tr. 405-406), returned a verdict in favor of petitioner in the sum of $50,000.00 (Rep. Tr. 404). The trial court, on motion of defendant-respondent Southern Pacific Co. (Cl. Tr. 152), granted said defendant a judgment notwithstanding the verdict (Cl. Tr. 167-170; Appendix C). In addition, the trial

court granted said defendant a new trial in the alternative; in the event that the order granting the judgment notwithstanding the verdict would be held erroneous by a reviewing court (Appendix C).

The California Court of Appeal, First Appellate District, Division Three, affirmed the judgment notwithstanding the verdict and dismissed petitioner's appeal from the order granting the new trial as moot (Appendix B at p. 7). Petitioner thereupon petitioned the Supreme Court of California for a hearing. Said Petition was denied, as above noted, without opinion (Appendix A).[2]

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[2] A denial of a petition for hearing by the California Supreme Court does not necessarily operate as an adjudication that the petition was not meritorious. The California Supreme Court has complete discretion with respect to hearing civil cases, as noted above, and often denies hearings in meritorious cases. See, e. g., Scala v. Jerry Witt and Sons, 3 Cal. 3d 359, 370 (1970), disapproving some 6 prior recent California Court of Appeal cases in which hearings had previously been denied the California Supreme Court. See the following disapproved cases (cited in Scala at footnote 1, 3 Cal. 3d at p. 364; their disapproval noted at p. 370), Matlock v. Farmers Mercantile Co., 258 Cal. App. 2d 362 (1968); Kincaid v. Sears, Roebuck & Co., 259 Cal. App. 2d 733 (1968); Hayes v. Long Beach Banana Distr., Inc.,

The evidence adduced at the trial established that Mr. Smith, petitioner's decedent, was a switchman (Rep. Tr. 25) and the engine foreman in charge of a crew of four working for defendant on the midnight shift on April 12, 1966 (Rep. Tr. 39, 65. See also Opinion of California Court of Appeal, Appendix B at p. 2). The crew's duties that night consisted of picking up and delivering freight cars from and to various "side industries" whose tracks connected with the railroad tracks (Rep. Tr. 61, 62, 72, 76, 85, 91). In connection with these duties, defendant required its employees to jaywalk continuously back and forth across the public street (Rep. Tr. 64, 76, 85, 90, 91).

Shortly prior to Mr. Smith's death, he and his crew had commenced to service the American Can Company, which was located on Alameda Street in Oakland, California. Alameda Street was a long industrial street, with no intersections or cross-walks in the immediate area (see Exhibits 2, 3 and A). The night was dark, the street lighting was poor, and it was raining (Rep. Tr. 41, 42, 43,

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[2] (Continued from previous page.)

270 Cal. App. 2d 658 (1969); Russell v. Nelson, 1 Cal. App. 3d 919 (1969); Schultz v. Mathias, 3 Cal. App. 3d 904; Stauek v. Kohrs, 8 Cal. App. 3d 283 (1970). In all of these cases, the California Supreme Court denied hearings.

296, 301). In conjunction with his duties, Mr. Smith was required by defendant to jaywalk across Alameda Street at that point, in the dark, rainy night (Rep. Tr. 40, 41). He was required to walk across in order to open gates on the American Can Company property or to use a telephone located on said property. (Opinion of the California Court of Appeal, Appendix B, p. 3; Rep. Tr. 40, 41, 64). This requirement could have been eliminated had defendant required American Can Company to have its own employees open the gates and had defendant required that the telephone be relocated (Opinion of the California Court of Appeal, Appendix B, p. 6; Rep. Tr. 40, 57, 59-62, 78, 86, 100, 131, 168, 219-220). Defendant had notice that the situation was dangerous, since there were "employee complaints regarding the danger and frequent accidents in the area." (Opinion of the California Court of Appeal, Appendix B, at p. 5. See also Rep. Tr. 111-112, 138-140, 170-173.)[3]

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[3]The trial court refused to admit the proffered evidence of frequent accidents. This evidence showed that, prior to the accident in suit, there were 34 reported accidents in that area involving defendant's trains and motor vehicles (Rep. Tr. 170-173, 176). We believe it was error to refuse this testimony, and the California Court of Appeal appears to have accepted the proffered testimony, but ruled that, in spite of it, no cause of action was established.

Nevertheless, defendant concededly did nothing to eliminate the necessity of making these crossings. Nor did it furnish or require any type of equipment or gear to illuminate the employee or the crossing (Rep. Tr. 46-49, 111, 136, 138).

As a result, while jaywalking across this long, dark, rainswept street, at about 4:00 a.m. on April 12, 1966, Mr. Smith was struck and killed by an automobile being driven by Mrs. Trudy Coker (nee Baldez) (Rep. Tr. 44-45, 286-290; Appendix B at p. 3).

The manner in which Mrs. Coker was driving is described in the Opinion of the California Court of Appeal (Appendix B at pp. 3-4). However, contrary to the Opinion of the Court of Appeal, the evidence does not establish that Mrs. Coker was glancing over her shoulder at the point of her trip which related to the accident (Rep. Tr. 287). Moreover, the evidence establishes that her ability to perceive objects or lights was not in any way impaired (Rep. Tr. 295). The evidence further establishes that, prior to hitting Mr. Smith, Mrs. Coker saw a speck of light in front of her, which could have been either Mr. Smith's lantern or his yellow helmet (Rep. Tr. 295-296, 298-302). She did not understand the significance of this speck of light (ibid). The lantern which Mr. Smith was carrying, in fact, generated only a little speck of colorless light which was of no value in signalling a motorist (Rep. Tr. 192-193, 214). The testimony thus established that had

Mr. Smith been carrying a more visible light, such as a flashlight with a phosphorous wand (Exhibit 12), Mrs. Coker would have seen him and avoided the accident.

As noted above, defendant neither furnished nor required any such equipment. The Court of Appeal incorrectly stated the evidence, in stating that flares were available to Mr. Smith (Appendix B at p. 6). The evidence established that the flares were unavailable and unsuitable because:

1. Respondent's Safety Rules prohibited the use of flares for any purpose "other than that for which they are provided," and they were provided for use only where main train line movements or obstructions were involved. Respondent never authorized them for use in the manner suggested by the above referred to phase of the Opinion of the California Court of Appeal (Rep. Tr. 151, 229, 242-243, 248, 264); and

2. Switchmen were instructed not to give signals, of the type at issue here, with the flares, because of the hazards involved (Rep. Tr. 121, 122, 225-228, 230).

Nor was there any evidence that Mr. Smith had available to him any other means of giving warnings.

The California Court of Appeal found that "the jury could have agreed that S. P. Co. should have eliminated the need to cross the

street." (Appendix B at p. 4. See also Appendix B at p. 6). The California Court of Appeal further found, as noted above, that "there were employee complaints regarding the danger and frequent accidents in the area." (Appendix B at p. 5). Nevertheless, the Court of Appeal found "a complete absence of probative facts that any lack of care of respondent played a part in the death. . . ." (Appendix B at p. 7.) Thus, the Court of Appeal held that, as a matter of law, no danger was created by the failure to eliminate the need to cross the street and that, as a matter of law, "(t)here was no satisfactory evidence that the area was particularly hazardous." (Appendix B at p. 6). The Court of Appeal thus found, in effect, that the negligence of the third party motorist, Mrs. Coker, insulated defendant from liability. (Appendix B at p. 7), despite the fact that under the evidence the jury could have found that Mr. Smith should not have been exposed to such negligence and should not have been directed to work in a manner that required him to regularly jaywalk across the public streets at night.

As we shall now show, the foregoing establishes that the California courts have decided federal questions in a way not in accordance with the applicable decisions of this Court, and have deprived petitioner of her federally-created rights.

REASONS FOR GRANTING THE WRIT

A. The State Courts Herein Have Decided Federal Questions of Substance in a Way Not in Accordance With Applicable Decisions of This Court.

1. The Subsequent Negligent, or Even Reckless or Wilful, Acts of a Third Party, Do Not Insulate a Defendant Under the Federal Employers Liability Act From Liability for Failure to Provide a Safe Place to Work.

It is well-settled that a railroad may be liable for exposing its employees to harm that could only come about through the subsequent intervening negligent, or even criminal, acts of third parties. Lillie v. Thompson, 332 U.S. 459, 68 S.Ct. 140 (1947).

And in the precise situation where a railroad has exposed its employees to the reckless acts of motorists, this Court has repeatedly held that jury questions are presented as to the railroad's liability.

Thus, in Cahill v. New York, New Haven & Hartford Railroad Co., 350 U.S. 898, 76 S.Ct. 180 (1956), rehearing denied, 350 U.S. 943,

76 S. Ct. 300, amended on other grounds, 351 U. S. 183, 76 S. Ct. 758, this Court granted certiorari, and, in the same order, without opinion, reversed the judgment of the Court of Appeals (reported in 224 F. 2d 637 [2nd Cir. 1955]). The Court of Appeals had reversed the judgment in favor of the plaintiff. The facts were as follows: plaintiff, a brakeman employed by defendant, was flagging motor vehicular traffic stopped behind a train standing at a highway crossing. A truck suddenly started up without warning and struck plaintiff.

In Atlantic Coast Railroad Co. v. Small, 348 U. S. 946, 75 S. Ct. 439 (1955), rehearing denied, 349 U. S. 907, 75 S. Ct. 579, this Court similarly granted certiorari and reversed the judgment of the Court of Appeals, without opinion. The Court of Appeals decision (reported in 216 F. 2d 842 [4th Cir. 1954]) had granted a judgment notwithstanding the verdict to defendant railroad on the following facts: plaintiffs, employees of defendant railroad company, were injured by an automobile while standing at a crossing waiting to be picked up by one of the company's passenger trains. The jury found for plaintiffs on the theory that defendant was negligent in failing to provide them a safe place to work in that it had not lighted the crossing at which they were standing (see Opinion of the Court of Appeals, 216 F. 2d at page 843). The Court of Appeals had held that defendant was not guilty of negligence in failing to light the crossing, and that plaintiffs' injuries resulted solely from the negligence of the automobile driver. By its reversal, this

Court rejected this rationale and found that a case establishing defendant railroad's liability for negligence had been made out.

See also:

Eubanks v. Thompson, 334 U.S. 854, 68 S.Ct. 1528, reh. den., 335 U.S. 837, 69 S.Ct. 14 (1948). (Here, too, this Court granted certiorari and, in the same order, without opinion, reversed the judgment of the Arkansas Supreme Court reported in Missouri Pacific Railroad Co. v. Eubanks, 207 S.W. 2d 610 (Ark. 1948). The Arkansas Supreme Court had held that the sole proximate cause of plaintiff's injury was the negligence of an automobile driver who had struck plaintiff as he was standing on a step in front of the train. Plaintiff had signalled the car to stop at the crossing, but the automobile nevertheless ran into him.);

Arnold v. Panhandle & Santa Fe Railway Co., 353 U.S. 360, 77 S.Ct. 840 (1957), reh. den., 354 U.S. 927, 77 S.Ct. 1375, reversing 283 S.W. 2d 303 (Ct. of Civ. App. Tex. 1955).

Inman v. Baltimore and Ohio Railroad Company, 361 U.S. 138, 80 S.Ct. 242 (1959), relied on by respondent in its briefs to the California courts, is not in point. Therein, plaintiff was struck by a negligent motorist while flagging trains. In that case, however,

the railroad had taken extensive precautions to protect plaintiff, had had no notice of similar accidents and had no reasonable means of preventing the injury. At bar, of course, defendant took no precautions to protect Mr. Smith, had notice of the dangerous condition -- both by reason of complaints and by reason of frequent accidents in the area -- and could have prevented the injury by exercising feasible precautions.

2. Under the Decisions of This Court, It Is Clear that a Jury Question Was Presented at Bar.

This Court has made it clear in a number of decisions that the right to a jury trial is "part and parcel of the remedy" under the Federal Employers Liability Act. Dice v. Akron, C. & Y. Railroad Co., 342 U.S. 359, 363, 72 S.Ct. 312 (1951). See also Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355, 82 S.Ct. 780 (1962). Where the proofs justify "with reason, the conclusion . . . that negligence of the employer played any part at all in the injury or death . . . even the slightest" the determination of liability must be that of the jury. Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 506-507, 77 S.Ct. 443 (1957); Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 114-115, 83 S.Ct. 659 (1962). See also: Dennis v. The Denver & R.G.W.R. Co., 375 U.S. 208, 84 S.Ct. 291 (1963); Shenker v. Baltimore & Ohio R. Co.,

374 U.S. 1, 83 S.Ct. 1667 (1963).

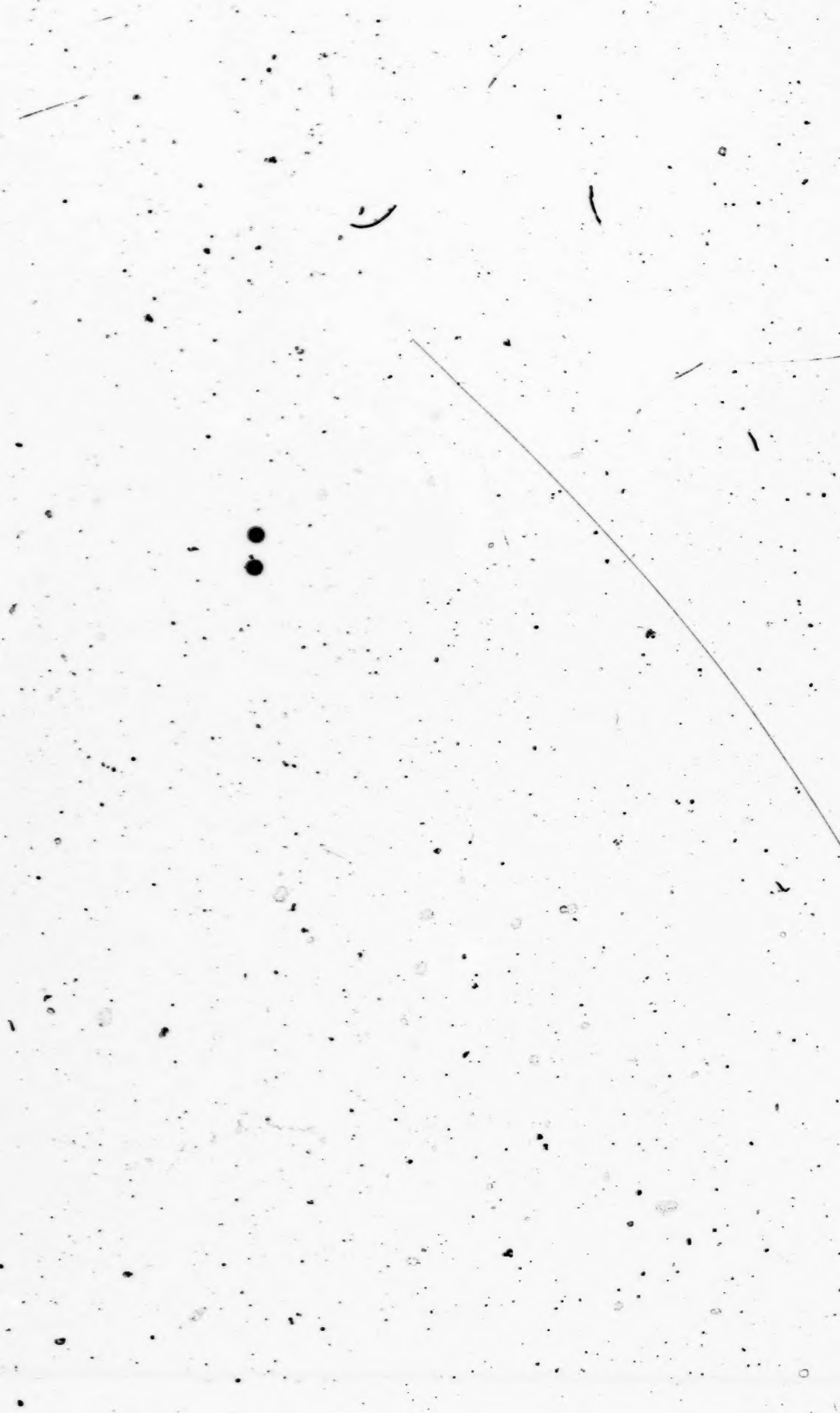
While paying lip service to the foregoing rules (e.g., Appendix B, pp. 4-5), the California courts have, we respectfully submit, failed to follow said rules in the subject case. We respectfully submit that it cannot be said that the jury was unreasonable in concluding that defendant was negligent in requiring its employees to continuously jaywalk back and forth across the public street at night, in the dark, with no equipment affording visibility. And particularly was this conclusion reasonable in view of the previous complaints and frequent accidents in the area in question. We respectfully submit that, in concluding that, as a matter of law, defendant's requirement that its employees work in this manner did not create a danger (Opinion of Court of Appeal, Appendix B at p. 6), and that, as a matter of law, the area where Mr. Smith was struck and killed was not "particularly hazardous" (Opinion of the California Court of Appeal at p. 6), the Court of Appeal has plainly disregarded the well-settled rules laid down by this Court in the cases cited above and many others.

We respectfully submit that the danger that the above-described jaywalking would expose its employees to the negligent, or even reckless, acts of motorists was manifest, and readily foreseeable by defendant. The area in question was dark, and seemingly deserted. It could be foreseen that motorists about at that hour might be drinking, and speeding, and

reckless in other respects.[4] We respectfully submit that defendant's admitted failure to take any precautions whatever to guard against such perils plainly represented questions of fact for resolution by the jury, and that plaintiff has been erroneously deprived of her federally created right to a jury trial herein.

---

[4]Respondent relied heavily in the California courts on two factual matters: (1) that Mrs. Coker allegedly took her eyes off the road and (2) that she was driving without her lights on. As to the first matter, there is no evidence that Mrs. Coker took her eyes off the road at the point of her trip which relates to the accident, except to look through the rear view mirror (see p. 10, supra, Rep. Tr. 287), an action which does not even constitute negligence. As to the second matter, annexed hereto as Appendix G is a list of California cases we have found in which there was evidence that a motorist was driving about in the dark without lights. We therefore respectfully submit that the foreseeability of such activity is for the jury. Moreover, we respectfully submit that it is not necessary that the peculiar facts of the particular accident be foreseeable; the general danger of harm from motorists is all that need be foreseeable, in order for liability to attach. That danger, we respectfully submit, was plainly foreseeable herein.



3. In the Event that This Court Agrees that the Judgment Notwithstanding the Verdict Was Erroneous, the Question of the Propriety of the Order Granting the New Trial Remains.

As we have noted, the Superior Court granted not only a judgment notwithstanding the verdict to defendant, but also, in the alternative, a new trial. We believe that this order was erroneous under federal standards, which should be applied herein.

See:

O'Neil v. W.R. Grace & Co., 410 F.2d 908 (5th Cir. 1969);

Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C. Cir. 1969);

Levin v. Metropolitan Life Authority, 349 F.2d 608, 614-615 (3rd Cir. 1968);

Duncan v. Duncan, 377 F.2d 49, 53-55 (6th Cir. 1967), cert. den., 389 U.S. 913, 88 S.Ct. 239.

We will not burden this Court with an extensive discussion of this issue, since the total deprivation of petitioner's right to a jury trial is the main issue involved herein. However, we respectfully submit that the order

granting the new trial also erroneously deprived petitioner of her rights under the Federal Employers Liability Act. See Harsh v. Illinois Terminal R. Co., 348 U.S. 940, 75 S. Ct. 362 (1954); Bowman v. Illinois C.R. Co., 142 N.E. 2d 104 (Ill. Sup. Ct. 1957), cert. den., 355 U.S. 837.

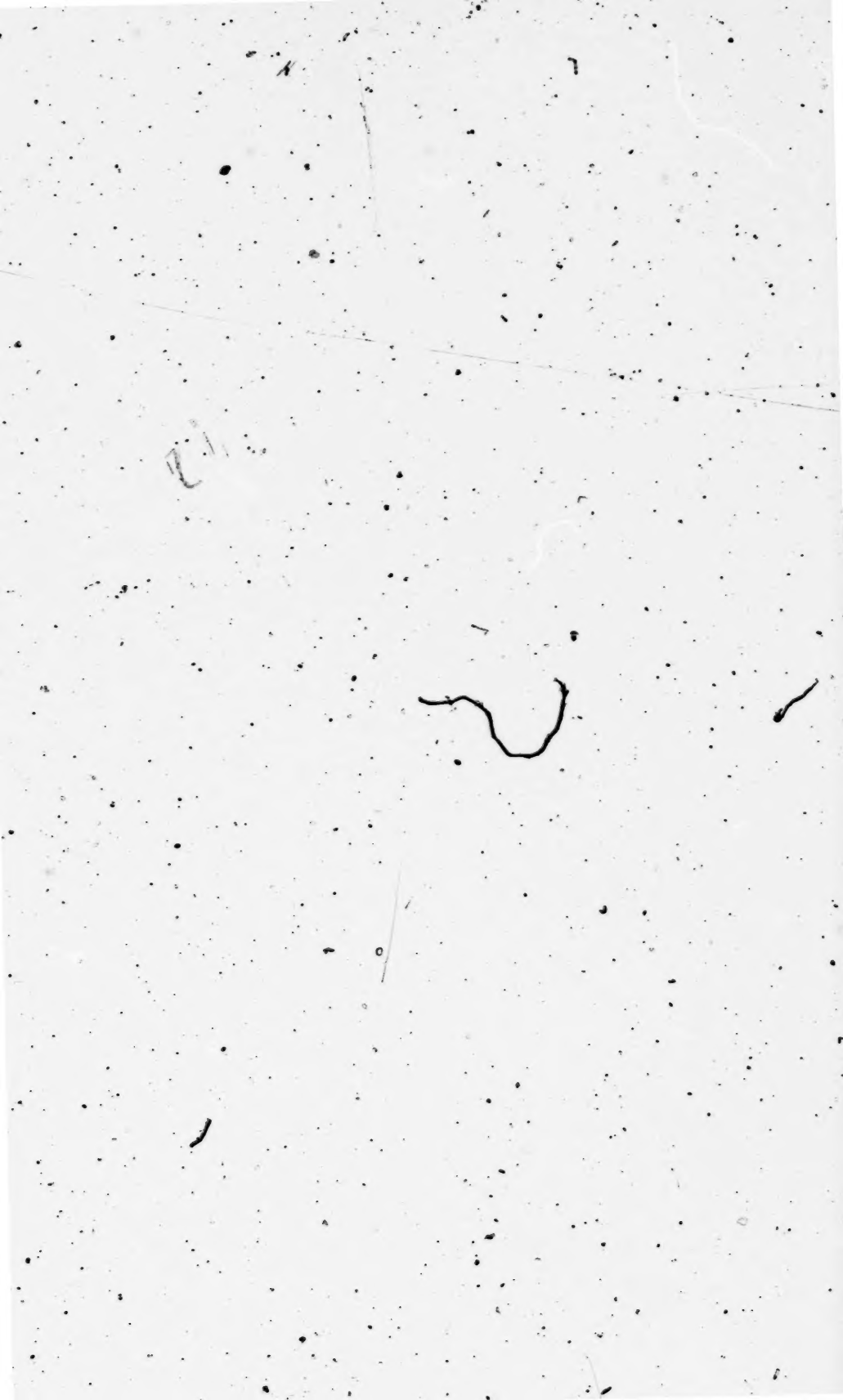
CONCLUSION

The subject Writ should be granted.

Respectfully submitted,

O'CONNOR & SEVEY and
LEONARD SACKS

Attorneys for Petitioner
Florence E. Smith



APPENDIX A

CLERK'S OFFICE SUPREME COURT
4250 State Building

San Francisco, California 94102

Dec. 23, 1971

Dear Sir: I have this day filed Order _____

HEARING DENIED

In re: 1 Civ. No. 27643

Smith

vs.

Southern Pacific Company

Respectfully,

G. E. BISHEL
Clerk

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,
DIVISION THREE

FILED Oct. 28, 1971
Court of Appeal -
First App. Dist.
By Clifford C. Porter, Clerk
Deputy

FLORENCE E. SMITH, Administratrix of the Estate of Robert Smith, deceased,	) 1 Civil) 27643
Plaintiff and Appellant, vs.	) (Sup. Ct.) No. 573,) 210)
SOUTHERN PACIFIC COMPANY, a corporation,	)
Defendant and Respondent.	)

Plaintiff appeals from a judgment notwithstanding the verdict entered in favor of defendant and from an order granting motion for new trial.

On December 1, 1966, appellant, as administratrix of the estate of Robert Smith, filed an action under the Federal Employers'

Liability Act, 45 U.S.C.A., section 51, et seq., alleging that the deceased had been killed as a result of the negligence of the defendant in failing to furnish deceased with a reasonably safe place to work and reasonably safe and suitable equipment.

The jury returned a verdict for plaintiff in the sum of $50,000 and the trial court granted a motion for judgment notwithstanding the verdict and the order granting motion for a new trial.

The sole issue necessary for consideration on this appeal is whether there is a complete absence of probative facts that negligence of the employer played a part in causing the death for which damages are sought.

The evidence disclosed that on April 12, 1966, at approximately 4:00 a.m., Robert Smith (Smith), a 44-year old switchman employed by the Southern Pacific Company (S.P. Co.) was struck and killed by an automobile while crossing Alameda Street in an industrial part of Oakland.

On the night of the accident, Smith was the foreman of a crew of four. The crew's duties consisted of picking up and delivering freight cars to and from various "side industries" whose tracks connected with the railroad tracks. The industries were located on one side of Alameda Street. The S. P. Co.'s railroad tracks were located on the other side and connecting tracks crossed

Alameda Street.

Although the exact reasons that Smith walked across Alameda Street are unknown, it may be accepted that he was in the course of his employment. He apparently intended to open certain gates of the American Can Company or to use a phone on S. P. Co.'s business. Both activities would come within the duties of his employment. Alameda Street was a long industrial street with no intersections or crosswalks in the immediate area. The night was dark, the street lighting was poor, and it was misty. Smith was wearing a yellow hard hat and was carrying a lighted switchman's lantern. Smith got to a point near the middle of Alameda Street when he was struck by an automobile driven by Mrs. Trudy Bales Coker. Mrs. Coker did not see Smith before she collided with him.

Mrs. Coker at the time of the accident was driving approximately 40-45 miles per hour in a 25-mile per hour zone in an attempt to elude a would-be suitor who was chasing her in his car. In attempting to do so, she had turned out her headlights. She also testified that she was not watching the road consistently during the chase but was glancing over her shoulder and looking into her rear view mirror in an attempt to keep an eye on the car following her.

On the evening in question, Mrs. Coker had been working at her job as a barmaid until

sometime after 2:00 a.m. She had been drinking beer. Although the extent of her drinking was not brought out with certainty, she conceded that she felt the effects of the beer. She felt "[j]ust kind of relaxed; not drunk or not sober, but just relaxed." She was initially charged with felony vehicular manslaughter. Subsequently, the charge was reduced to felony hit-and-run to which she pleaded guilty.

As this case is based upon the Federal Employees' Liability Act, the question of sufficiency of the evidence is controlled by federal law. (Waller v. Southern Pacific Co., 66 Cal.2d 201, 206.)

In Rogers v. Missouri Pacif. R. Co., 352 U.S. 500, the United States Supreme Court laid down the rule that "[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence. (Emphasis added.)" (Id. at 506-507.)

Appellant points to two ways in which the jury could reasonably have concluded that the employer was negligent. First, the jury could have agreed that S.P. Co. should have eliminated the need to cross the street.

Second, in those instances where Smith necessarily had to cross, S. P. Co. should have provided equipment which would have made the employee crossing the street more visible to traffic, such as a helmet with phosphorous strips, a luminous vest or a flashlight with a phosphorous wand. Appellant also emphasizes that there were employee complaints regarding the danger and frequent accidents in the area.

"The test of negligence in supplying the employee a safe place to work is 'whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger.' [Citations.]" (Mortensen v. Southern Pacific Co., 245 Cal. App. 2d 241, 244.)

In Simpson v. Texas and New Orleans Railroad Company, 297 F. 2d 660, the court said: ". . . [T]he plain language of the Federal Employers' Liability Act makes unmistakably clear that it is not a workmen's compensation act but provides relief only for injury or death resulting in whole or in part from the negligence of the employer railroad, . . .

* * * * *

"No decision has been cited, nor have we found any, holding an employer railroad liable under the Act for an injury incurred in the performance of an everyday, ordinary action, such as walking on the street or crossing the street, when the injury results

from the action of some third person. . . ." (Id. at 662.)

Appellant suggests that the danger of crossing the street on foot could have been eliminated by having American Can Employees open the gates and by relocating the phone. We cannot agree, however, that the failure to do so created a danger. There was no satisfactory evidence that the area was particularly hazardous.

Appellant's argument that the railroad company should have furnished additional safety equipment does not find reasonable support under the circumstances here. The equipment suggested by appellant required a light source to be shining on it which would not have benefitted Smith as the car was being driven without lights. Also it was not shown that this suggested light source would be any more visible than the lantern appellant was carrying. The most highly visible piece of equipment mentioned in the case was a flare which was in fact available to appellant had he felt he was in a position which warranted its use.

At the time of the accident, Smith was wearing a "bright yellow" hard hat, was carrying a railroad lantern that was used for railroad signalling for distances up to one mile. Smith was the engine foreman on the train switching detail and he, undoubtedly, could have provided warning lights, flares, etc., if there was an exsiting danger.

Here Smith was hit by a motorist driving an automobile far in excess of the state's speed limits, while under the influence of alcohol, in the dark of night with the headlights of her vehicle turned off. Further, Mrs. Coker believed she was looking in the rear view mirror at the moment of impact. Under these circumstances, she would not have seen Smith regardless of his clothing or what he was carrying.

We have determined that appellant has not met the burden of proving that the street where deceased was walking was an unsafe place to work. [illegible]han v. Baltimore Ohio R. Co., 361 U.S. [illegible] We believe that the trial court was justified in concluding that the sole cause of the accident in question was the negligent driving of the vehicle by Mrs. Coker and that there is a complete absence of probative facts that any lack of care of respondent played a part in the death for which damages are sought.

The judgment notwithstanding the verdict is affirmed. The appeal from the order granting a new trial is dismissed as moot. (Code Civ. Proc., § 629; Kaake v. Lott, 252 Cal. App. 2d 895, 901.)

CERTIFIED FOR NONPUBLICATION

Brown (H. C.), J.

We concur:

Draper, P. J.

Caldecott, J.

APPENDIX C

(Title of Court and Cause)

"F I L E D
JUN 6 1969
MARTIN MONGAN, CLERK
By: James J. O'Connor,
Deputy Clerk."

ORDER GRANTING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND MOTION FOR NEW TRIAL

Defendant's motion for judgment notwithstanding verdict granted.

Defendant's motion for new trial granted upon the ground of insufficiency of evidence to support the verdict.

For the purpose of fulfilling the requirements of Section 657 CCP requiring a statement of the reasons for the Court's granting of said motion, the Court has already indicated by granting defendant's motion for judgment notwithstanding the verdict that as a matter of law there is no evidence in the case which would support a finding of negligence on the part of defendant Southern Pacific Company.

While the evidence is virtually uncontradicted, it fails to show that Southern Pacific Company failed to do or did anything constituting negligence which was a proximate cause of the death of decedent. The evidence discloses that decedent, a 44-year-old engine foreman in charge of a switching operation,

while crossing Alameda Street in Oakland, California, was struck by an automobile driven by a Miss Trudy Baldez.

Inferentially, Plaintiff's purpose in crossing the street from the evidence was either to open a gate on the premises of American Can Company to pick up a switch list or to telephone a burglar alarm company on a special phone located at the company gates.

While crossing the street carrying a lighted switching lantern, he was struck by the automobile being driven by Miss Baldez who was driving at a speed estimated at between 40 and 60 miles per hour in a 25-mile zone. Miss Baldez had been drinking and while perhaps not intoxicated admitted that she felt the effects of the alcoholic beverages consumed. Additionally, the evidence is that she was driving at 4:00 A. M. on a dark and misty morning and at the time of the accident was driving with her lights out because she was being pursued by a boy-friend who was driving another vehicle, whom she was trying to avoid. Miss Baldez further testified that she did not see the decedent before he was struck by her vehicle and additionally testified that she turned around while driving to determine whether her suitor was still following in his automobile.

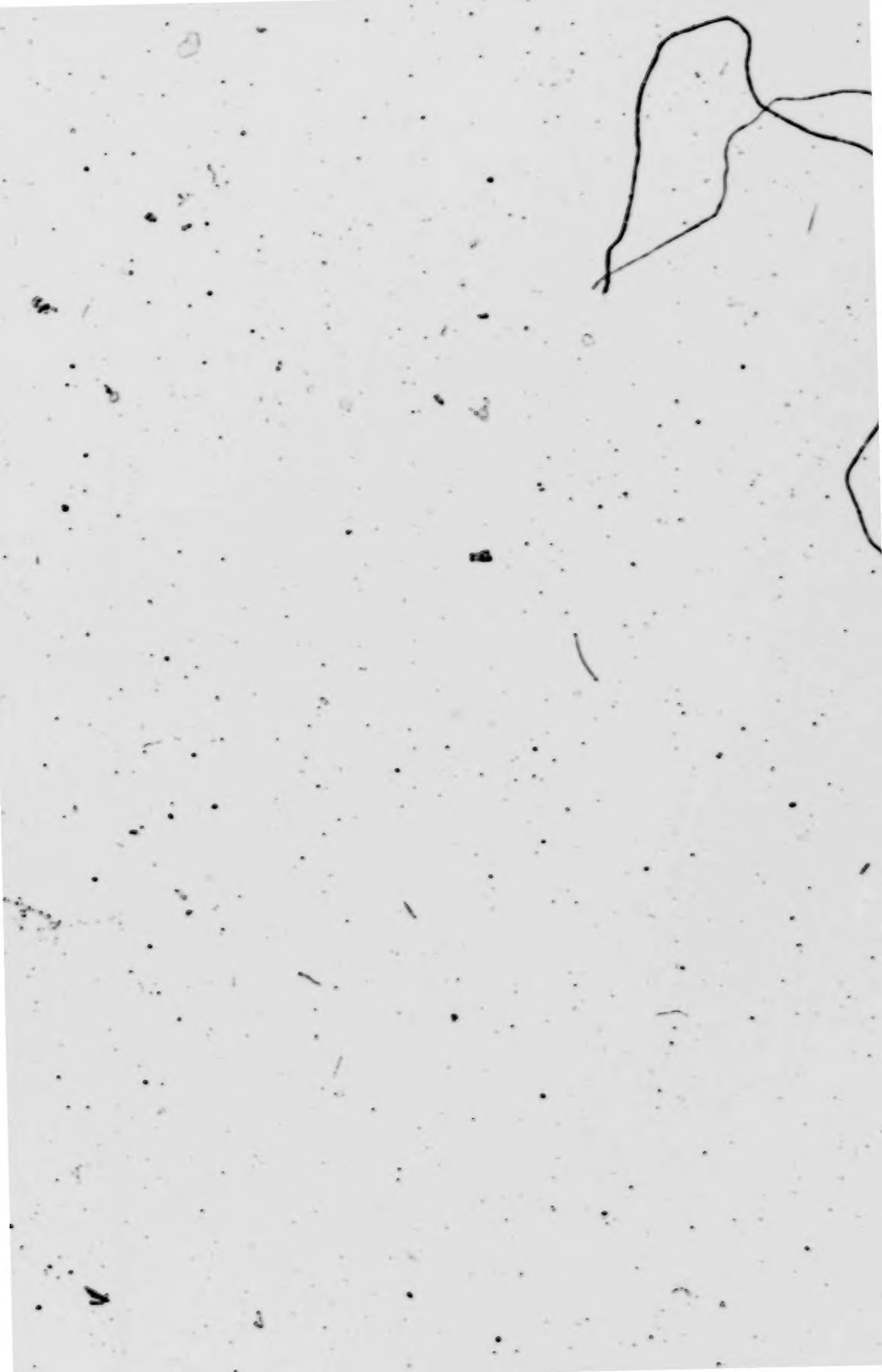
Therefore, in the opinion of the Court the evidence clearly establishes the negligence of Miss Baldez as being the sole proximate cause of the accident. Despite plaintiff's

evidence concerning alternative methods, warning devices, etc., there is no evidence of any negligence on the part of Southern Pacific Company which was a proximate cause of the accident. The record here indicates that plaintiff's death was caused by the negligent conduct of the driver of an automobile and possibly contributed to by the conduct of the deceased. To require defendant to shield decedent from ordinary traffic hazards in crossing a public street would require it to be an insurer of his safety rather than liable upon the basis of negligence.

While it is true that plaintiff has made no motion for new trial on the ground of inadequacy of damages, the decedent in this case was 44 years of age with a life expectancy of 28 years and earning apparently $8,000 per year. The evidence of contributory negligence on the part of decedent is entirely circumstantial and very slight. Manifestly, an award of $50,000 in the event that there is liability is grossly inadequate.

DATED: June 6, 1969.

/s/ Charles S. Peery
JUDGE OF THE
SUPERIOR COURT



APPENDIX D

FILED
Nov. 15, 1971
Court of Appeal-First App. Dist.
By Clifford C. Porter, Clerk
Deputy

COURT OF APPEAL OF THE STATE
OF CALIFORNIA

In and For the

FIRST APPELLATE DISTRICT

Division THREE

Florence E. Smith, etc.,
Plaintiff and Appellant,

vs. No. 27643

Southern Pacific Co.,
Defendant and Respondent.

BY THE COURT:

The Petition for a Rehearing filed in the above-entitled cause is hereby denied.

Dated Nov. 15, 1971

DRAPER, P.J. P.J.

APPENDIX E

45 U.S.C. §51

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed

by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

45 U.S.C. §56

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

APPENDIX F

(Title of Court and Cause)

"INDEXED PLFF
INDEXED DEFT
REGISTERED
ASSIGNED TO DEPT. 18
APR 21 1969
O'Day, Presiding Judge."

"F I L E D
DEC 1 1966
MARTIN MONGAN,
CLERK
By: D. E. Dunn,
Deputy Clerk."

COMPLAINT FOR WRONGFUL DEATH AND DAMAGES

Plaintiff, FLORENCE E. SMITH, as Administratrix of the Estate of ROBERT SMITH, deceased, complains of defendants, and each of them, and for a first cause of action alleges:

I

That said ROBERT SMITH, deceased, died intestate on the 12th day of April, 1966, in the County of Alameda, State of California, in the manner hereinafter alleged, and at the time of his death he was a resident of the County of Alameda, State of California.

II

That the Superior Court of the State of California, in and for the County of Alameda, by its Order on the 27th day of September, 1966,

duly appointed plaintiff as the Administratrix of the Estate of ROBERT SMITH, deceased; that plaintiff duly qualified as the Administratrix and Letters of Administration were issued out of said Court on the 12th day of September, 1966, and that plaintiff ever since and now is the duly qualified and acting Administratrix of the Estate of ROBERT SMITH, deceased.

III

That said ROBERT SMITH, deceased, left surviving him the following persons who are his only heirs at law: FLORENCE E. SMITH, his wife at the time of his death; ROBERT SMITH, his son, BONNIE SMITH, his daughter, both of said children being minors at the time of the death of ROBERT SMITH. That this action is brought for the benefit of these heirs by the personal representative duly appointed.

IV

That the true names or capacities, whether individual, corporate, associate or otherwise, of defendants DOE ONE through DOE THREE are unknown to plaintiff, who therefore sues said defendants by such fictitious names. Plaintiff is informed and believes, and thereon alleges, that each of the defendants designated herein as a "DOE" is negligently responsible in some manner for the events and happenings herein referred to, and negligently caused injuries and damages proximately thereby, as

herein alleged, and plaintiff will ask that when the true names of said defendants are ascertained, that this complaint may be amended to insert the true names of said defendants, together with appropriate charging allegations.

V

That at all times herein mentioned, defendants DOE ONE through DOE THREE were the agents and employees of each of the remaining defendants, and were at all times mentioned herein acting within the purpose and scope of said agency and employment. That at all times herein mentioned, defendant, SOUTHERN PACIFIC COMPANY, was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and that said defendant at all times herein mentioned was and now is engaged in the business of a common carrier by railroad in interstate commerce in the City of Alameda, County of Alameda, State of California.

VI

That at all times herein mentioned, defendant was a common carrier by railroad engaged in interstate commerce, and ROBERT SMITH was employed by defendant in such interstate commerce, and the injuries sustained by him, as hereinafter complained of, arose in the course of and while ROBERT SMITH and defendant were engaged in the conduct of

such interstate commerce.

VII

That this action is brought under and by virtue of the provisions of the Federal Employer's Liability Act, 45 U. S. C. A., Section 51, et seq.

VIII

That on or about the 12th day of April, 1966, at or about the hour of 4:00 o'clock a. m., decedent was employed by the defendant as a switchman performing the duties required by a member of a switching crew on a public street and highway, to wit, Alameda Street between east 8th Street and Fruitvale Avenue, in the City of Oakland, County of Alameda, State of California.

IX

That at said time and place, defendant owed to the deceased the duty of use ordinary care to furnish him with a reasonably safe place in which to perform his work; the duty to exercise ordinary care to supply him with reasonably safe and suitable equipment; the duty to provide reasonably sufficient and competent help to perform the task assigned to him; the duty to enact and enforce the rules to enable the deceased to accomplish the task assigned to him; the duty to warn the deceased of dangerous work procedures and conditions;

the duty to instruct the deceased in the method and manner in performing the work required of him; the duty to warn the deceased of the unsafe nature of the task required of him to be performed; the duty to provide the deceased with adequate safety equipment with which to perform the task assigned; the duty to provide reasonably safe switching procedures; and the duty to provide reasonably safe lighting conditions at the place of work.

X

That the defendants knew, or should have known, in the exercise of reasonable care that said public highway and place of work at said time and place constituted a highly dangerous and unsafe place in which to work, and the said defendant knew or should have known that said public highway was devoted almost exclusively to the use of vehicular traffic; that the defendants, and each of them, knew that the place of work then and there occupied by the deceased constituted a highly dangerous and unsafe place in which to work; that said place to work included danger to the deceased's physical person as well as to the defendant's railroad property and equipment; that the defendants knew or should have known that said place of work exposed the deceased to the extreme danger of being injured and/or killed by the lawful or unlawful operation of motor vehicles along and upon said public highway at said time and place.

XI

That by reason of the negligence of the defendant in violating the duties hereinabove set forth in whole or in part and at the time and place herein mentioned, to wit: When the deceased was attempting to cross said public street and highway in the City of Oakland, County of Alameda, State of California, and in the performance of his duties the deceased was caused to be mortally wounded as a result of being struck by a motor vehicle operated along and upon said public highway where said deceased was performing his work.

XII

That at the time and place aforesaid mentioned, the decedent's death was caused in whole or in part by the negligence of the defendant as hereinabove set forth. That by reason of these premises the plaintiff has been damaged generally in the sum of $500,000.00.

WHEREFORE, plaintiff prays judgment as hereinafter set forth . . .

COMES NOW THE PLAINTIFF, FLORENCE E. SMITH, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT SMITH, DECEASED, AND COMPLAINS OF THE DEFENDANTS, AND EACH OF THEM, AND FOR A SECOND CAUSE OF ACTION ALLEGES

I

Plaintiff hereby refers to paragraphs I. through XII inclusive of the first cause of action and by such reference incorporates the allegations of said paragraphs herein with the same force and effect as though said paragraphs were herein again set forth in full.

II

That as a result of the injuries inflicted upon the deceased at or about the hour of approximately 4:00 o'clock a. m., on or about the 12th day of April, 1966, the deceased suffered severe conscious pain and suffering prior to the time of his actual demise on said day, month, and year.

III

That by reason of these premises as above set forth, the said heirs of the deceased and FLORENCE E. SMITH as Administratrix of the Estate of ROBERT SMITH have been damaged in the sum of $50,000.00 for the conscious pain and suffering endured by the deceased up until the time of his death.

WHEREFORE, plaintiff prays judgment as hereinafter set forth . . .

WHEREFORE, plaintiff prays judgment in her first cause of action against the defendants, and each of them, as follows:

1. For general damges in the sum of $500,000.00;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may seem meet and proper.

WHEREFORE, plaintiff prays judgment in her second cause of action against the defendants, and each of them, as follows:

1. For damages in the sum of $50,000.00;

2. For costs of suit incurred herein; and

3. For such other and further relief as the Court may seem meet and proper.

O'CONNOR & LEWIS

By /s/ Leo M. O'Connor
Attorney for Plaintiff

APPENDIX G

Reported California cases in which there was evidence that a driver was driving without his lights on, in conditions of darkness:

Reynolds v. Filomeo, 38 Cal. 2d 5, 10;

Robbiano v. Bovet, 218 Cal. 589, 596-597;

Matlock v. Farmers Mercantile Co., 258 Cal. App. 2d 362, 364;

Newton v. Thomas, 137 Cal. App. 2d 748, 766 (inadequate headlights);

Casalegno v. Leonard, 40 Cal. App. 2d 575, 579;

Linde v. Emmick, 16 Cal. App. 2d 676, 683;

Tieman v. Red Top Cab Co., 117 Cal. App. 40;

Rapolla v. Goulart, 105 Cal. App. 417, 425;

Forrest v. Pickwick Stages System, 101 Cal. App. 426, 434-435;

Fouch v. Werner, 99 Cal. App. 557;

Peatfield v. Pacific Gas Rad. Co., 89 Cal. App. 623 (one light out);

People v. Vasquez, 85 Cal. App. 575;

Greeneich v. Knoll, 73 Cal. App. 1;

Wurl v. Watson, 67 Cal. App. 625.

Supreme Court, U. S.
FILED
MAR 15 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1054

FLORENCE E. SMITH, Administratrix of the Estate of ROBERT SMITH, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC CO., a corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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Hughes v. Great Northern Ry. Co., 462 P.2d 879 (Mont. 1969)	18
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vs.

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Respondent.

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OPINIONS BELOW

The written decision of the California Court of Appeal for the First District is appended to petitioner's brief as Appendix B. The written memorandum decision of the trial judge who granted respondent's alternative motions for judgment n.o.v. and new trial is appended to petitioner's brief as Appendix C.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief.

QUESTION PRESENTED

Notwithstanding petitioner's contrary assertions, there is only *one* question presented by her petition: Was there any satisfactory evidence of negligence on the part of the railroad which caused or contributed to the decedent's death? Petitioner sets forth numerous "Questions Presented" in her brief (at pp. 4-5). However, each of the alleged "questions" assumes factual findings which were either expressly or implicitly resolved against petitioner by the California Supreme Court, the Court of Appeal, and the trial judge. For example, petitioner's first argumentative "question" asserts that this court is to decide whether the trial court (and the two state appellate courts) erred in granting respondent's motion for judgment n.o.v. despite "substantial evidence" (1) of negligence on respondent's part in exposing decedent to harm at the hands of negligent third party auto drivers, and (2) of steps that respondent could have taken to avoid such exposure to harm. Presented thusly, petitioner's asserted "question" would appear on its face to raise a substantial issue for review. However, the California courts have uniformly found, petitioner's assertion to the contrary notwithstanding, that there was "no evidence" (let alone "substantial evidence") supporting her contention of railroad negligence. A review of petitioner's other "questions" will reveal similar erroneous factual assumptions in each of them. Thus, the *only* question raised by petitioner's appeal is whether respondent was negligent and whether this negligence resulted in decedent's death.

STATUTE INVOLVED

The statutory provision involved is 45 U.S.C. § 51, which states in relevant part that

> "Every common carrier by railroad . . . shall be liable in damages to any [employee] suffering injury . . . , or,

in case of the death of such employee, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ."

STATEMENT OF THE CASE

A. Summary of the Facts.

The facts, briefly stated, are as follows: On April 12, 1966, Robert Smith, a 44 year-old engine foreman employed by the Southern Pacific Company (hereinafter SPCO) was run over and killed by an automobile while walking across Alameda Street in an industrial part of Oakland. The time was about 4:00 a.m. and the weather condition was characterized as "misty." The decedent wore a bright yellow hard hat, and was carrying a lighted switchman's lantern. The automobile was owned and operated by a Miss Trudy Baldes (now Mrs. Trudy Ann Coker). Mrs. Coker, an off-duty barmaid, had been drinking excessively. At the time of the accident, she was trying to elude an amorous pursuer who was chasing her in his car. In attempting to do so, she was traveling almost *double* the *speed limit* in the area and had *turned her lights out*, so as to avoid being seen by her pursuer. Moreover, she testified that for some time prior to, and at the time of impact, she was not watching the road in front of her, but was glancing over her shoulder and looking into her rear view mirror in an attempt to keep an eye on the car chasing her. At no time prior to cutting down the decedent did Mrs. Coker see him, nor, apparently, did he see her, for she hit him squarely with the middle of her car. Both Mrs. Coker and her pursuer continued on down Alameda Street. It was not until several hours later that she decided to call the police and turn herself in. She was initially charged with felony vehicular manslaughter. Subsequently, however, the District Attorney's office reduced the charge to felony hit-and-run—to which Miss Baldes pleaded guilty.

Following introduction of the above evidence, the jury returned a plaintiff's verdict in the amount of $50,000.00. The trial court, concluding that there was no evidence of negligence on the part of SPCO which contributed to the decedent's death, granted SPCO's motion for a judgment n.o.v. and/or a new trial. Petitioner appealed to the Court of Appeal which affirmed the finding of the trial judge, concluding in part as follows:

> ". . . We believe that the trial court was justified in concluding that the sole cause of the accident in question was the negligent driving of the vehicle by Mrs. Coker and that there is a complete absence of probative facts that any lack of care of respondent played a part in the death for which damages are sought."

Thereafter, petitioner appealed to the California Supreme Court, which, after a review of her comprehensive brief and of the record from below, declined to grant a hearing. This petition has followed.

Because petitioner's argument is exclusively confined to the facts, it will be necessary to set forth in some detail the facts which were considered by the California courts in reaching the decisions that they did.

B. Conduct of Trudy Baldes Coker.

On the date of the accident, Mrs. Coker (at that time 22 years old), was employed as a barmaid in an Oakland tavern. (Reporter's Transcript 275-76.)[1] One of the tavern's customers on the evening in question was a butcher in his early thirties named Walter Hutchison, whom Mrs. Coker met for the first time that night. (RT 278.) Hutchison, who was a friend of another barmaid, came in the bar about 9:00 p.m. and was still there drinking at the 2:00 a.m. closing

1. Hereafter, Reporter's Transcript will be designated RT; Clerk's Transcript will be designated CT.

time. (RT 278-79, 293.) Another customer in the tavern that evening was a 21 or 22 year-old fellow whose name she recalled as being Stan Freitas. (RT 279-80, 295.) During the course of the evening, Mrs. Coker inexplicably made early morning dates with both Hutchison and Freitas. (RT 279-81.) At 2:00 a.m., Mrs. Coker locked the bar's doors and proceeded to clean up. (RT 277-79.) Hutchison and the other barmaid stayed inside with Mrs. Coker instead of leaving with the other customers. (RT 278-79.) In Mrs. Coker's words, "they stayed in there with me drinking." (RT 281.) Soon thereafter, Hutchison and the other barmaid left. Mrs. Coker remained inside for another one-half to one full hour finishing her cleaning chores. (RT 281.) When she herself left the bar, Hutchison was parked outside in his car. It was dark and he was alone. (RT 281.) No words were exchanged by either of them. (RT 282.) Mrs. Coker got into her car, turned on her lights and drove off—hoping to "lose" Hutchison. (RT 282.) After driving around a few blocks without successfully evading him, she stopped her car, rolled down her window, and told him to "get lost." (RT 282-83.) Then Mrs. Coker headed for the place where she had agreed to met the younger man, Stan Freitas. (RT 284.) There, she signaled to Freitas that she was being followed by Hutchison. (RT 284-85.) However, because she was fearful of a confrontation between Freitas and Hutchison, she stayed only for about a minute before driving off toward Alameda Street (RT 285.) Hutchison continued to follow her. (RT 286.) As she drove along Alameda, a street with which she was not familiar (RT 295), at a speed she testified as being "35, 40 miles an hour"[2] (RT 296), Mrs. Coker decided to turn off her headlights, "Because I wanted

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2. The speed limit on Alameda Street is 25 miles per hour. (RT 70-71; 196.) Two witnesses to the accident estimated the speed of Mrs. Coker's car as being betwen 40 and 50 miles per hour (RT 71; 161.)

to lose the person in back of me." (RT 286.) By this time she was at a point "About a block and a half before the railroad tracks." (RT 286-87.) She testified that she turned the lights off, "So that as I went around the curve he wouldn't see me." (RT 286-87.) (The end of the curve is seen in the background of the photograph identified as defendant's Exhibit A and appears to be several hundred yards west of the point where the decedent met his death.) Mrs. Coker did not turn the lights on again until sometime after she struck and killed the decedent. (RT 287.) And she compounded the danger created by her speed and lack of lights by continuing to watch for Hutchison—in the rear-view mirror and by glancing over her shoulder. (RT 287; CT 168.) In fact, it was this inattention to the street in front of her that lead to decedent's death, for Mrs. Coker testified that at the time of impact she was watching for Hutchison's car in her rear-view mirror and had been for "a couple of seconds" *before* impact. (CT 288.) She stated that although she knew she had hit something, it was not until Hutchison later pulled her over that she found out it had been a person. (RT 287.)

C. Intoxication of Mrs. Coker.

Mrs. Coker's testimony concerning the *amount* of alcoholic beverages she consumed during the evening was filled with inconsistencies. She initially stated that she had consumed "three or four" bottles of beer, but then conceded that it was "four bottles." (RT 279.) Subsequently, when pressed, she revised her figure upward to "four or five beers." (RT 297.) It is submitted that the effect of the consumption of five beers (assuming that is all she had) would be considerably greater on a 22 year-old girl, (RT 275) weighing only about 130 pounds, (RT 279) than on, for instance, a 180-pound, 40 year-old man who has had years to develop a tolerance to alcohol.

Similar inconsistencies were present in her testimony concerning *when* she drank these beers. At first, she testified that all of the beer was consumed prior to the 2:00 a.m. closing time. (RT 292.) However, it was subsequently brought out that at her deposition (taken some 10 months after the accident), Mrs. Coker had testified as follows:

> "Q. Do you have any recollection of having drank any beers at all after the bar closed at two o'clock and up until the time that you left?
>
> "A. I know I drank some beers but I don't know how many. I don't remember." (RT 300-01.)

It was also brought out that she had testified at her deposition that most of her drinking had been done between the hours of twelve midnight and two-thirty, i.e., shortly before the decedent was killed. (RT 303.)

Although the testimony of Mrs. Coker concerning her drinking contains conflicts, there is no question but that she was under the influence of alcohol—if not legally intoxicated—as she sped away from her pursuer that evening. She conceded that she felt the effects of the beer and that she was "not sober." (RT 279, 292.)

D. Conduct of Decedent and the Train Crew.

Throughout the trial of this case, petitioner's attorney attempted to show that this accident occurred in a hazardous area; that the decedent was not provided safe equipment with which to perform his duties; and that SPCO required him to take known and dangerous risks in the course of performing his duties as an engine foreman. It is important, therefore, that the court be aware of *what* decedent's duties were on the night of the accident, and *where* those duties were being performed when he was struck down and killed.

The decedent was a 44 year-old engine foreman with SPCO. (RT 25, 39.) An engine foreman is a switchman charged with the responsibility of organizing and directing the efforts of the other switch crew members. The company tells the foreman what work it wants accomplished and the industries to serve, but it is up to the foreman to dictate to the crew the *details* of service, i.e., *how* the work is to be done. (RT 263, 261, 164, 145, 93, 65.)

The train crew in the decedent's group consisted of four men, including himself, two switchmen and an engineer. A railroad engineer takes his orders from the foreman. He does not and *cannot* move his locomotive without first getting an order from the foreman, either directly or through one of the other switchmen. (RT 77, 159, 164.) These orders are generally given by way of hand signals during the day and railroad lanterns at night. (RT 162, 93.)

All of the switchmen on the decedent's crew, including the decedent himself, carried these lanterns. (RT 68, 162.) The lanterns are battery-operated and contain two bulbs or globes. (RT 34, 253-54.) Lanterns, replacement batteries and globes are furnished free of charge by SPCO. (RT 68, 93.) Because of the extensive use of the lanterns by train crew members to communicate with one another at night,[3] one railroad employee witness called by petitioner to discuss railroading practices called his own lantern his "right arm." (251.) The same witness testified that a switchman's lantern is designed so that it can be seen by the engineer and other train crew members from any angle, regardless of the direction the holder is walking or facing. (RT 253-54; see also 214-16.) Another witness called by petitioner as an expert on railroading practices testified that a standard railroad

3. Engineer Parker testified that it was possible, with the exception of one unusual train move, for an entire evening to go by with communications between engineer and crew being accomplished solely by use of lantern signals. (RT 163.)

lantern of the type held by the decedent at the time he was run over, could be used to signal instructions 70 to 100 cars away. (RT 68.) Inasmuch as railroad boxcars (including couplings) average out to about 50 feet each, it follows that a standard railroad lantern can be used to pass signals as far as one mile.

The train crew reported for duty at 12:00 midnight (RT 30). Their job that night and morning was to pick up and deliver freight cars from and to various industries in the industrial part of Oakland. (RT 72, 76.) These industries are served by means of spur tracks running from SPCO rights of way. (RT 129-30.) At some time prior to 4:00 a.m., the crew reached the vicinity of the accident scene, i.e., the area around American Can Company. (See Exhibit A. The buildings shown in the right foreground of that picture are on the premises of American Can.)

Once decedent and his crew arrived at American Can, he walked across Alameda Street and placed a call on a private phone line to a burglar-protection company (ADT) employed by American Can, to advise that the crew would be going through several of American Can's gates. (RT 83-84, 220-21, 262.) He then picked up several switch lists (documents specifying the cars to be pulled from the premises) from a mailbox-like container which was located next to the ADT private phone. (The phone is shown as "S-3" and the switch list box as "S-4" on Exhibit A.) He then opened one of the gates leading into the premises, following which the engine came across Alameda Street; the crew hooked onto a car; pulled it out; and then "kicked" it down a track on the opposite side of Alameda. (RT 76-77, 80, 86-87.) Thereafter, decedent started across Alameda to open another American Can gate. He left the engine and the rest of the crew on SPCO's right of way across the street from American Can. (RT 65-66, 77-79, 81, 83.)

One of the crew members, switchman Siegfried, recalled that decedent's lantern was on and that he was wearing his "bright yellow" hard hat. (RT 34, 66.) At that time the switch engine was at rest, with its headlight on "dim," facing in the direction from which Mrs. Coker's automobile was coming. The time was about 4:00 a.m., and Siegfried characterized the lighting in the area as being "just fair." (RT 41, 72.) The weather was described as being "misty." (RT 176, 186, 189, 208.) When asked about the traffic conditions on Alameda Street that night, Siegfried testified that he had walked across the street at "various times" during the course of the same evening, and that he had encountered only "light traffic." (RT 87-88) When asked about the necessity of walking across public streets in order to perform regular railroad switching duties, Siegfried acknowledged that it was commonplace to do so; that in performing this same job over the past 15 years, he had done it the same way as on the night in question (RT 71-72); that there was nothing unusual about walking across Alameda Street that night (RT 87); and finally, that in walking across the street, the decedent was performing his job in the same way that it had been performed for "a long time before this accident." (RT 95-96.)

The decedent got to a point near the middle of Alameda Street before he was cut down by the Coker automobile. Neither engineer Parker nor switchman Siegfried saw the vehicle strike him, although both heard the impact. (RT 41, 46, 66, 155, 157.) They estimated the vehicle's speed as being 40-50 miles per hour. (RT 71, 161.) The speed limit along Alameda Street is 25 miles per hour. (RT 70-71, 196.) They testified that the Coker automobile did not have its lights on (RT 45, 71, 161); that it knocked the decedent flying through the air (RT 44, 66); that the Coker car was being followed by another car traveling "close behind" and with its lights on (RT 45); and that neither car slowed down or stopped following impact. (RT 45, 164.)

ARGUMENT

It has been SPCO's position throughout, that there was no evidence that it had done—or failed to do—anything which contributed to the death of Mr. Smith; that the sole proximate cause of the accident was the gross negligence of Mrs. Coker, concurred in perhaps by some contributory negligence of the decedent. It is submitted that the exhaustive statement of facts set forth above demonstrates that there was nothing SPCO could have done which would have *effectively* shielded the decedent from the blind flight of Mrs. Coker.

Following is a discussion of two relatively recent FELA decisions dealing with the liability of railroads to employees for injuries sustained as a result of the negligent driving of third parties. It is urged that these two cases, both of which were decided after *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506-07 (1957), this court's leading decision on the question of FELA negligence, virtually compel a ruling by this court in favor of the railroad.

A. A Railroad Is Not an Insurer of the Safety of Its Employees; in an FELA Action the Plaintiff Must Prove That the Employer Was Negligent. And Negligence Cannot Be Grounded on the Failure of the Railroad to Shield the Plaintiff from Ordinary Traffic Hazards.

The leading case on the rule announced above, and closely on point with respect to the instant action, is *Inman v. Baltimore & Ohio R. Co.*, 361 U.S. 138 (1959). It involved an FELA action brought by the plaintiff employee against the B&O for injuries suffered when he was struck in the middle of the night by a passing auto while on duty as a crossing flagman. The plaintiff had been assigned to this particular crossing for seven years—the last three on the same midnight shift. His duties as a crossing flagman *required* him to stand in the street near the crossing and flag cars—to warn

of passing trains. Moreover, he was *required*, while standing in the street, to face passing trains (to spot defective axles and hanging equipment), and he alleged that this requirement made his place of work unsafe, since it meant that he had to turn his back to traffic in the intersection. One night he was struck by an automobile at the crossing—despite the fact that he was carrying a lighted lantern in both hands. The driver of the auto, like the driver in the instant case, had been drinking and had run a stop sign prior to striking the plaintiff and, in doing so, had committed a total of five traffic violations.

The trial court submitted the issue of negligence to the jury, which found the B&O negligent "in part" for failing to provide "enough protection." The Ohio Court of Appeals reversed on the grounds that "there was a complete failure of proof to establish the negligence." The court continued in relevant part as follows:

> ". . . And there is further *no evidence of prior occurrences of the kind here under consideration,* which would put the defendant on notice of likelihood of injuries to one in the position of plaintiff.
>
> "That the plaintiff, while in discharge of his duties as crossing watchman, would be injured by the actions of a drunken driver, violating five traffic statutes and ordinances, *was not, in our opinion . . . reasonably foreseeable* by defendant.
>
> "There was, accordingly, no duty imposed on defendant to anticipate such an occurrence as eventuated, and hence no negligence for failure to guard against it." (108 Ohio App. 124; 161 N.E.2d 60, 66 (1958), emphasis added.)

The court went on to conclude that at worst,

> ". . . Defendant created a situation in which the negligence of [the driver] operated to bring about the injury. Defendant's act was merely a condition and in no sense a concurring proximate cause of the injury." (Id.)

The Ohio Supreme Court affirmed. This court granted certiorari and likewise affirmed, saying in part:

> "In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957), we laid down the rule '[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.' *Id.*, at 506-07. In measuring Ohio's disposition of the case here by the *Rogers* yardstick, we must affirm. The Act does not make the employer an insurer. Here petitioner had been working at [the intersection in question] for seven years, performing these same duties under like circumstances and, for some three years, on this identical midnight shift. No accidents had occurred during that long period. In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury.
>
> ". . . The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there other testimony of similar occurrences in the record." (361 U.S. 140.)

This court concluded that the facts as set forth above, together with testimony of a single witness that cars frequently "jumped the gun" at the crossing, were insufficient to support a finding of negligence. It agreed with the Ohio Court of Appeals that there was "*no evidence of prior occurrences of the kind under consideration*" (emphasis added), which would support the testimony of the aforementioned witness. It held, therefore, that based on the evidence, the trial court should not have submitted the question of negligence to the jury.

SIMILARITIES BETWEEN INMAN AND THE INSTANT CASE.

Traffic infractions. In *Inman*, this court was impressed with the extent to which the auto driver had violated traffic rules (five in all) in injuring the plaintiff. In the instant case the same is true: Mrs. Coker was arguably guilty of (a) drunken driving; (b) reckless driving; (c) excessive speed; (d) driving without lights on; (e) failure to yield to a pedestrian; and (g) failure to stop and give aid.

Lanterns. In both *Inman* and this case, the injured parties were carrying lighted lanterns, yet were still hit.

Drinking drivers. In both cases the injuries were caused by drinking (if not drunken) drivers.

No equipment failures. In both cases all railroad equipment was operating properly.

Prior complaints or similar occurrences. The *Inman* court noted that although one of plaintiff's witnesses had testified that "a lot" of cars "jumped the gun" at the crossing, there was no evidence of prior "*similar occurrences*" in the record. The record in this case is similarly bare. In fact, it was uncontroverted that Assistant Terminal Superintendent O'Donnell (a "candidly honest fellow," said petitioner's attorney in his closing argument) could not recall any auto-pedestrian accident or near accident involving train crews during the 10 or 15 years he had worked in the Oakland area.

DISSIMILARITIES BETWEEN INMAN AND THE INSTANT CASE.

In several respects, *Inman* can be distinguished from the case at hand. However, most of those points of distinction favor the contention of SPCO that it was not negligent, and that the death of the decedent was the result of the concurring negligence of Mrs. Coker and the decedent.

Place of work. Inman was *required to stand in the street* as part of his job. Moreover, he was required to stand with his *back to the traffic* in order to observe passing trains. The decedent, on the other hand, was required only to do a job which entailed that he—like millions of other employees in all kinds of occupations—use the city streets to walk across; a very incidental use. If this court could not find that Inman's work location was an inherently unsafe place to work, surely it could not so find in the instant case.

Amount of traffic. The street in which Inman was injured was described as being "heavily traveled." On the other hand, auto traffic on Alameda Street that night was described as being "light." (In fact, switchman Siegfried couldn't even remember when the last car preceding Mrs. Coker's had come by.) It seems clear, therefore, that the street area where Inman was required to work was much more dangerous, potentially, than the one involved in this case.

Contributory negligence. There is no hint in the *Inman* decision that the plaintiff himself was negligent. In the present case, however, it is quite likely that the decedent would not have been killed had he been alert to the possibility of oncoming cars.

Headlights. Inman was also injured at night. If the driver who ran over him was operating without headlights, the reviewing courts did not deem it worthy of mention. It is uncontroverted, however, that Mrs. Coker was driving with her lights out.

The other federal decision which directly supports the position of the three California courts below is *Simpson v. Texas & N. O. R. Co.*, 297 F.2d 660 (5th Cir. 1962). There, the plaintiff-employee brought an action under the FELA for injuries suffered when he was struck by an auto while within the scope of his employment. Plaintiff was a mes-

senger for the defendant railroad. The defendant furnished him with a motorcycle which he used in his employment. On the date of the accident, the motorcycle broke down. Plaintiff therefore called his superior and was told to use public transportation instead. This plaintiff did. Upon reaching his destination, he got off the bus and began crossing the street. At the time it was raining heavily. An approaching car failed to stop and hit the plaintiff, causing severe injuries. In the action, plaintiff alleged that the railroad had been negligent in the following respects:

> (1) In failing to furnish plaintiff with a safe means of transportation;
>
> (2) In failing to maintain the equipment which plaintiff was required to use in a safe and workable condition;
>
> (3) In failing to remedy the defect to the motor cycle upon learning of this condition; and
>
> (4) In failing to furnish plaintiff with proper protection from the weather when defendant knew that plaintiff, in the course of his occupation, would be required to be out in all types of weather.

The District Court sustained the defendant's motion to dismiss the complaint. On appeal the dismissal was affirmed. While agreeing that if the plaintiff had been injured as the result of an accident associated with the breakdown of the motorcycle, his action would have been good, the court held that once the plaintiff left the motorcycle and got on the bus

> ". . . the chain of causation between breakdown of the motorcycle and any subsequent occurence was broken, and plaintiff's situation was no different than it would have been if he were normally required to perform his duties on foot and by use of public transportation. Thereafter plaintiff's injuries were caused by an ordinary automobile accident which may have been unavoidable, or may have resulted from the negligence of the automobile driver, the negligence of the plaintiff,

or both—but clearly not the negligence of the defendant railroad. *To hold that defendant should have shielded plaintiff from ordinary traffic hazards is tantamount to making it an insurer.* The Act does not make the railroad company an insurer against personal injuries to its employees.

> *"No decision has been cited, nor have we found any, holding an employer railroad liable under the Act for an injury incurred in the performance of an everyday, ordinary action, such as walking on the street or crossing the street, when the injury results from the action of some third person."* (297 F.2d 662, emphasis added.)

It is urged that on the basis of the record herein and the foregoing FELA decisions, the trial judge was correct in granting SPCO's motion for a judgment n.o.v.; and that the California appellate courts had little choice but to affirm.

Other FELA cases of varying degrees of helpfulness to SPCO's case are as follows:

Shea v. New York, N. H. & H. R. Co., 316 F.2d 838 (1st Cir. 1963), in which directed verdict for employer-railroad was upheld on appeal where plaintiff had been run over in railroad's parking lot by the auto of a third person; *Chesapeake & Ohio Ry. Co. v. Burton*, 217 F.2d 471 (4th Cir. 1954), where jury verdict in favor of plaintiff conductor, who was struck by a drinking driver while standing at a crossing near his stalled train, was reversed on appeal, the court holding that there was no evidence of railroad negligence; *Ambold v. Seaboard Air Line R. Co.*, 345 F.2d 30, 34 (4th Cir. 1965), where judgment n.o.v. in favor of defendant railroad was affirmed on appeal, it appearing that plaintiff's fall from a platform which he had walked over many times before and after the accident was the result of his own inattentiveness; *Cuddy v. Western Maryland Ry.*, 229 F. Supp. 443, 445 (D.C.Pa. 1963), aff'd 332 F.2d 371 (3rd Cir.

1964), cert. den. 379 U.S. 340 (1964), where a judgment n.o.v. in favor of the railroad was affirmed, the court holding that the trial record concerning the shooting of plaintiff's deceased by a fellow employee demonstrated little evidence of employer negligence; *Spinello v. New York C. & St. L. R. Co.*, 181 N.E.2d 884 (Ohio 1962), where a judgment n.o.v. in favor of the railroad was affirmed on the ground that there was no evidence of railroad negligence causing the death of the plaintiff's deceased, who died as the result of an auto accident occurring in the course and scope of his employment. See also *Hughes v. Great Northern Ry. Co.*, 462 P.2d 879, (Mont. 1969); *Gulf M. & O. R. Co. v. Joiner*, 29 So. 2d 255 (Miss. 1947); *Rhinelander v. St. Louis & S. F. Ry. Co.*, 257 S.W.2d 655 (Mo. 1953).

B. Brightly-colored Paraphernalia Would Have Been of No Value to Decedent.

Petitioner contends that SPCO was negligent in not providing the decedent with bright colored clothing and paraphernalia which would have made him visible at night to oncoming motorists. The answers to this contention are as follows:

Blind flight of Mrs. Coker. Mrs. Coker failed to see the decedent even though he was wearing a bright yellow hard-hat and was carrying a lighted lantern that could be seen from any angle for distances of up to a mile. The obvious reason she didn't see him was because she wasn't looking out her windshield; and even if she had been, her criminal act of driving twice the speed limit with lights out, would have prevented her from seeing him anyway.[4]

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[4] See, e.g., the testimony of petitioner's own expert witness. During the direct examination of the witness, petitioner's attorney introduced into evidence several bright-colored gadgets and items of clothing, such as a red hat and an orange vest. (RT 192.) On cross-examination, however, the expert admitted that under the facts of this case, the colored objects would have been of little, if any, value. After the witness conceded that it was dangerous for

Need for independent light source. Even petitioner's own witnesses conceded on cross-examination that the bright-colored paraphernalia would have been valueless under the circumstances of the case. For example, petitioner's expert was asked about the effectiveness of the paraphernalia in the absence of a light source shining on them. Although the record doesn't indicate what items the witness was inspecting, his testimony leaves one with a distinct impression that few, if any, of the items introduced as suggested safety aids are visible in the absence of an independent light source. (RT 203-04.) And the witness expressly conceded that the bright tape strip on the helmet would not shine unless a light was directed toward it. (RT 204.)[5]

Mrs. Coker to have been traveling as fast as she was with her lights out at 4:00 in the morning, the following testimony was elicited (at RT 196-97):

"Q. And intersection or no intersection, if you are going two times the speed limit without your lights on and not looking through the windshield, none of this [the brightly colored paraphernalia] would do any good to prevent an accident, would it (indicating)?

"A. If you are driving without your lights and not looking through the windshield, that's right.

* * * *

"Q. If you are driving two times the speed limit without your headlights on at four o'clock in the morning, and it is dark, then in your expert opinion none of these things (indicating) would do one bit of good; is that correct?

"A. That is correct.

"Q. Everything you said [on direct examination about the possible value of the paraphernalia] presupposes that the motorist is looking where he or she is going; is that correct?

"A. Yes.

"Q. If we added to that the fact that—assumed that the motorist is exceeding the speed limit by two times, not looking through the windshield, light off, and is in a semi-intoxicated condition, you would also agree that none of these things would do any good in preventing an accident (indicating); is that correct?

"A. Apparently not. Probably not."

5. Similar testimony was elicited during the testimony of switchman Siegfried (RT 70):

"Q. Now, the difference between a fusee [a flare] and this paraphernalia on counsel's table is this: it [a fusee] illumi-

Availability of other warning devices. There was an abundance of evidence that the train crew (which, it should be recalled, was under the direct supervision of the decedent himself) had access at all times to intensely bright flares (called "fusees" on the railroad) and a large red flag which could have been used to warn passing motorists of the presence of the train crew—had the decedent felt that it was necessary to do so.

The flares and the flag were on the locomotive (RT 69, 101-02, 116-17, 148, 163), and were available to "anybody" on the crew who wanted one. (RT 69, 102-03, 116-17, 147-48.) Contrary to petitioner's assertion (p. 11 of her brief), fusees are a standard railroad signaling device and are frequently used in inclement weather because of their brilliance. (RT 146, 147, 149.) Moreover, there was no rule prohibiting the decedent from utilizing a fusee under the circumstances present in this case. (RT 69, 98, 102-03, 116-17, 147, 148.)

Incompatibility of paraphernalia with railroad operations. Much of the paraphernalia introduced by petitioner was impractical for use in railroad operations and was offered only for "show" purposes. This point was illustrated by one of petitioner's *own* witnesses (McNamara), a retired switchman with over 40 years of railroading experience. On direct examination, petitioner's attorney asked McNamara about the use of some of the paraphernalia to put in

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nates itself; these things [petitioner's paraphernalia] have to have lights shined on them. Is that right?

"A. That's right.

"Q. You have seen these kinds of things [petitioner's paraphernalia], I take it?

"A. Yes.

"Q. If you don't shine a light on this, if you have your headlights off, it isn't going to illuminate, is it?

"A. Not much.

"Q. But a fusee, if you put it down you don't have to shine any lights on it, do you?

"A. That's right."

the street to warn that a man is going to be walking across. (Nothing was said about the protection to be afforded the man setting the devices out on the street in the first place.) McNamara allowed as how the paraphernalia were "nice", but then went on to say: "Yes, but what are you going to do? How are you going to carry them?" (RT 118-19.) Similarly, McNamara was asked on cross-examination about the brightly colored vest that petitioner's attorney had suggested would be effective for focusing a driver's attention on a switchman-pedestrian. The testimony (RT 119-20) was as follows:

"Q. Well, Mac, when you are in the switching business, you don't want to be wearing a loose garment like this, is that right; you don't want loose garments that catch on things when you are working, hanging on cars, is that right?

"A. No, you wouldn't.

"Q. And why is that?

"A. Well, you could be taken off of the side of a car if you had loose—or something projecting out in these industrial yards, and there are fences and there are gates and there are walls.

"Q. What do you mean by 'taken off;' the garment would catch on something and pull you off the car?

"A. That's right."

Lack of evidence of safety value of suggested paraphernalia. The record is absolutely devoid of *any evidence* concerning the *safety value* of the various devices introduced into evidence by petitioner. No one testified, for example, that a phosphorus wand is valuable when stuck in a flashlight; that it is more visible at night than a railroader's lantern; or, that its use would be compatible with ordinary railroad practices. Apparently, petitioner's counsel assumed throughout the trial that his paraphernalia had some sort

of inherent, intrinsic safety value which required no discussion or explanation. It is submitted that much more was required than the simple introduction into evidence of the devices. It is urged that the failure to bulwark the tangible evidence with *testimony* concerning its value constitutes one more fatal flaw in petitioner's case.

C. Respondent Did Not Require the Decedent to "Jay Walk" Across Alameda Street.

Throughout petitioner's brief there are references to the alleged fact that SPCO "required" the decedent to "jaywalk" across Alameda Street. There is not one shred of evidence in the record to support this contention. In California, the term "jaywalk" is a term of art which denotes an *illegal* crossing of a street (a) *between crosswalks* or traffic control signal devices (see Calif. Vehicle Code § 21955) such as would be the case if one walked across the street in the middle of the block in a *regularly intersected* downtown area—which Alameda Street is not—or (b) at an *angle across* other streets, such as would have been the case if the decedent had been walking across Alameda Street at a sharply acute angle (see Vehicle Code § 21956).[6] Suffice it to say that petitioner has not pointed to any evidence (because there is none) which would support her use of the term "jaywalk." There is no evidence in the record that the decedent was doing anything except walk directly across Alameda at the moment he was struck down. Accordingly, it is suggested that petitioner's constant use of the term is deliberately inaccurate, misleading and inflammatory.

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6. The fact is, there are no statutory restrictions in California which would preclude one from walking across industrial streets such as Alameda, which is not regularly intersected and which does not have traffic signals or pedestrian crossings. (See Vehicle Code § 21954, which permits a pedestrian to cross unmarked streets such as Alameda.)

Furthermore, the evidence was uncontroverted that the decedent, as the man in charge of the train crew, could have ordered the engineer to drive him across Alameda on the locomotive. (RT 257-58.) However, had he done so, it would have taken several extra minutes to get across the street because of the need to properly align all the right switches (RT 258, 260); would have left the engine sitting across the middle of the road while the gate into American Can was being opened (RT 258); and would still have required him to drop down from the engine into the street before walking over to the gate. (RT 258-60.) The decedent's failure to order the engineer to drive him across can be attributed to (a) the fact that as a result of his years of experience on that job, he did not think that it was necessary; (b) the inconvenience in terms of time spent and effort expended; (c) the fact that the engine blocking the street would create a much more dangerous situation—for both the train crew on the engine and the motoring public; and (d) the fact that the gate opener would still have to drop into the street before getting over to the gate, and hence, be exposed to the same traffic hazard.

D. The Area Where the Decedent Was Working Was Not a Dangerous Area.

Petitioner contends that the decedent was required to work in a dangerous area. This contention is based on the fact that there were 34 auto/train accidents—dating as far back as 1928—in the Oakland Terminal area (which covers many square miles and over 1,000 railroad-served industries) prior to decedent's accident.[7] (RT 133.) As footnote 7 indicates, there was no evidence of prior accidents before

7. Both here and in the appellate courts below petitioner has *improperly* raised the subject of prior accidents. As her brief points out, there were 34 auto/train collisions—occuring all over the Oakland Terminal—prior to decedent's accident. Petitioner learned of these accidents through answers to interrogatories. At

the jury. However, because petitioner insists on raising the question on appeal, several points should be made in rebuttal.

No prior similar occurrences. There was no evidence proffered or introduced in this trial about prior accidents involving *pedestrians* (railroad employees or otherwise) and motor vehicles. The only time the subject came up was when petitioner's attorney was questioning Assistant Terminal Superintendent O'Donnell, whom that same attorney characterized in closing argument as being "candidly honest." (RT 321.) Mr. O'Donnell was asked whether he was aware of any prior incidents wherein train crew members were hit or nearly hit at night, by motor vehicles, near the American Can premises. To which he replied: "I do not recall any accident or near accident reported to myself or any of my subordinates during the 10 or 15 years prior to the accident that I have worked in this area." (RT 139-40.)

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trial, she twice attempted to introduce evidence of same. (See RT 138-40, 170-76.) The second occasion was a formal offer of proof made in the trial judge's chamber. The offer consisted merely of reading those answers into the record. Her attorney knew nothing about the facts of any of the accidents; he did not know where the crossings were that he was referring to; he did not know whether the accidents happened during the day or at night; he did not know what geographical surroundings were involved in the other accidents; and he did not know what weather conditions were involved in the other incidents. (See RT 170-76.) The judge refused to admit the evidence on the ground that the offer of proof was "completely lacking in foundation." (RT 176.) Following this ruling, petitioner did nothing—despite the fact that the trial lasted four more days—to prepare a proper foundation as to similarity of accidents, conditions, etc. Instead, she acquiesced in the trial judge's ruling. However, the fact that there was no evidence in the record concerning prior accidents has not prevented her from raising the point again and again on appeal (although, significantly, she has not appealed the ruling of the trial court in refusing the proffered "evidence"). Now, before this court, petitioner brazenly states that "the Court of Appeal appears to have accepted this proffered testimony" concerning prior accidents in the Oakland Terminal area. It is submitted that the Court of Appeal did no such thing, for it expressly held that "There was *no satisfactory evidence* that the area was particularly hazardous." (Emphasis added.)

Accidents were atypical. As noted in footnote 7, petitioner learned of the prior accidents from certain of SPCO's answers to interrogatories. Those answers showed, among other things, that there were no fatalities involved in the prior accidents and only two injuries. This indicates that most of those accidents probably involved the striking of parked cars (parked on or too close to the various spur tracks in the industrial areas of Oakland), since typically, train-auto crossing accidents have a much higher percentage of injuries and deaths.[8]

E. Plaintiff's Petition Does Not Present Any Novel or Undecided Legal Issues; It Simply Asks This Court to Review and Reweigh Evidence Already Passed Upon by Three California Courts.

Petitioner made the same arguments in the three California courts that she makes to this court, and all three resolved the purely factual issues against her: all found that there was no evidence of negligence on the part of the railroad which contributed to the decedent's death; that the cause of the accident was the criminal recklessness of Mrs. Coker, concurred in perhaps by some contributory negligence of the decedent himself. (See Court of Appeal opinion, p. B-7; trial court memorandum opinion, p. C-3.) Petitioner does not contend, nor could she, that the courts below failed to follow the correct rules of law applicable in FELA cases. She simply urges that the California courts have paid "lip service" to them, but have failed to follow their guiding principles.

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8. Exhibit A demonstrates how close autos park to train tracks in the area. Often, train crews try to squeeze by these parked cars when their owners can't be located and, in the process, hit the autos with the corners of large boxcars (which have considerable overhang). These collisions, then, are reported to the Public Utilities Commission. It is submitted that if petitioner's attorney had been prepared to discuss the facts of prior accidents, most would have been of this variety:

In that regard, one important point should be made. The *same* Court of Appeal panel that decided the instant case also decided the leading California case on FELA negligence/causation—*Mortensen v. Southern Pac. Co.*, 245 Cal. App.2d 221 (1966).[9] In that case, on very little evidence of negligence, SPCO was held liable to an employee for failing to have provided his company vehicle with seat belts. The Court of Appeal held it should have been foreseeable to SPCO that with its large fleet of vehicles, many would be involved in accidents—often at the hands of negligent third parties—and that therefore, SPCO should have equipped its vehicles with seat belts. In the case at bar, however, the same appellate panel ruled that it was not foreseeable that an employee would be struck down by a drunken girl, traveling twice the speed limit with her headlights off, trying to elude a would-be suitor. Accordingly, this case is not one decided by an appellate court unfamiliar with the usual strict FELA principles, but one decided by a court sophisticated in the rules applicable to such cases.

For the reasons discussed above, the petition for a writ of certiorari should be denied.

DATED: March 14, 1972

JOHN J. CORRIGAN
DOUGLAS E. STEPHENSON

Attorneys for Respondent Southern Pacific Company

9. Petitioner's attorneys thought so highly of the reasoning in the *Mortensen* case, they cited in on six separate occasions in their opening brief before the Court of Appeal.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1054

FLORENCE E. SMITH,
Administratrix of the Estate of
ROBERT SMITH, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC CO.,
a corporation,

Defendant and
Respondent.

REPLY BRIEF OF PETITIONER FLORENCE E. SMITH

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Florence E. Smith

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REPLY BRIEF OF PETITIONER FLORENCE E. SMITH

INTRODUCTORY COMMENTS

It should be noted that Respondent's Brief does not controvert the fact that respondent could have feasibly eliminated

the necessity for Mr. Smith to cross the street. And it does not controvert the fact that there were employee complaints regarding the danger.[1] As we understand it, respondent's position is that, as a matter of law, it owed absolutely no duty to avoid exposing Mr. Smith to the hazards of jaywalking (Respondent's Brief at pp. 11-18) and that, as a matter of law, the negligence of the third party motorist, Mrs. Coker, insulates it from liability.

The latter proposition has already been fully briefed by us (but see also pp. 11-12, infra). The former proposition -- that respondent had no duty to protect Mr. Smith from the hazards of jaywalking -- is, we respectfully submit, devoid of merit. A jury question is presented as to the extent of respondent's duty. To the extent that respondent's authorities are inconsistent with petitioner's authorities on this point, they represent decisions of Courts of Appeal "in conflict" with decisions of other Courts of Appeal (Rule 19, Rules of this Court) and, indeed, with the decisions of this Court. See cases cited in our Petition at pp. 13-15. For an example of

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[1] We shall discuss below the question concerning other accidents in the area, since Respondent's Brief has seriously misstated the facts in connection with this issue. See pp. 5-9, infra.

a Court of Appeal decision in conflict with the holdings of the cases cited by respondent, at least as respondent interprets said cases, 2/ see Sleeman v. Chesapeake & Ohio R. Co., 414 F.2d 305 (6th Cir. 1969). Therein, plaintiff was injured by a negligent motorist while walking in defendant's parking lot. The Court of Appeals held that, in effect, defendant had a duty to protect its employees from the hazards of walking in a parking lot.

WITH RESPECT TO THE FACTS:

We will not burden this Court with a detailed rebuttal of respondent's statements with respect to the facts. Hence, our omission to discuss any particular factual matter set forth in Respondent's Brief does not amount to a concession of the correctness of such matter, to the extent that it is in conflict with the facts as stated in our Petition. We will

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2/ We do not agree that respondent's authorities support its views. Inman v. Baltimore and Ohio R. Co., 361 U.S. 138, 80 S.Ct. 242, discussed at length by respondent (at pp. 11-15 of Respondent's Reply Brief) has already been discussed by us (at pp. 15-16 of our Petition). The other cases on which respondent relies (pp. 15-18 of Respondent's Reply Brief) are also distinguishable. See pp. 10-11, infra.

only refer in this Brief to certain matters we have noted which appear to be seriously misleading.

One such matter is respondent's statement that Mr. Smith could have used the flares as a warning device (Respondent's Brief at p. 20). This testimony is directly contradicted by the testimony favorable to petitioner which we have set forth in our Petition (at p. 11). The resolution of this controverted testimony was, of course, for the jury.

Respondent's contentions with regard to the "jaywalking" (Respondent's Brief at pp. 22-23) are also incorrect. Even though the activity required of Mr. Smith might have been legal, it still constituted jaywalking. See Jones v. Fat, 86 Cal. App. 2d 823, 826; 2 Magana, "Motor Vehicle Accidents," §217, p. 1319; Webster's Third New International Dictionary, Unabridged (1965), p. 1212. If, as respondent contends, to term the activity "jaywalking" is "inflammatory" (Respondent's Brief at p. 22), we respectfully submit that that is only because of the dangerous nature of the activity, and such danger establishes that jury questions were present herein.

The last matter respecting the facts to which we will address ourselves is respondent's attempt to disregard and ignore the evidence of 34 other accidents in the area (Respondent's Brief at pp. 23-25). Respondent asks this Court to infer that most of these

accidents merely involved "the striking of parked cars" (Id. at p. 25). Respondent further asserts that the accidents occurred "all over the Oakland Terminal" and date back as far as 1928. Respondent's Brief at p. 25, text and footnote 7. These assertions are gravely misleading and incorrect.

The facts with respect to the other accidents are as follows:

This matter was first brought up on direct examination of Mr. O'Donnell, Assistant Terminal Superintendent of respondent, and a company official (Rep. Tr. 122:22-25; 124:21-22).

Petitioner's counsel asked Mr. O'Donnell how many accidents occurred in the 10-year period prior to the subject accident, at the crossing entering into the American Can Company property (Rep. Tr. 138:7-10). Objection as to "total lack of foundation as to what type of accident" (Rep. Tr. 138:11-13) was sustained (Rep. Tr. 138:14). Mr. O'Donnell was then asked how many vehicles struck equipment that was being shoved across that crossing at night with no lights (Rep. Tr. 138:15-18). Objection as to insufficient foundation was sustained (Rep. Tr. 138:19-22).

As petitioner's counsel started another question, the Court interrupted and advised petitioner's counsel that he would be limited to automobile-pedestrian collisions, if there is some similarity, but not automobile-train

collisions (Rep. Tr. 138:23-139:5). It was then brought out that automobile-train collisions must be reported to the Public Utilities Commission, but automobile-pedestrian collisions are not required to be so reported (Rep. Tr. 139:7-15). Inquiry as to whether records of automobile-pedestrian collisions would be readily available was objected to, and the objection was sustained (Rep. Tr. 139:16-20).

Counsel was thus limited to the witness' personal knowledge, and while the witness testified that he did not "recall" any accidents involving vehicles striking switching crews at night (Rep. Tr. 139:21-140:1), it is manifest that, in an organization the size of respondent, such accidents could have occurred without that particular witness having knowledge thereof (see Rep. Tr. 140:2-9). Respondent, the party with the information available to it, never came forward at the trial with any evidence to establish lack of similar accidents (see Taylor v. Canadian National Railway Co., 301 F. 2d 1, 2d Cir. 1962, cert. den. 370 U. S. 938) -- which evidence might have been admissible. See Whitley v. Texas and Pacific Railway Co., 328 F. 2d 308 (5th Cir. 1964). This silence was but a continuation of respondent's pre-trial tactics in which respondent demonstrated a determined and vigorous resistance to providing any information on this subject to petitioner by way of discovery.

The pre-trial proceedings with respect to the interrogatories, answers and motions

regarding this subject are contained at Cl. Tr. 24, 34-53, 57, 76, 77, 80-82, 84-87, 98. They establish respondent's reluctance and refusal to disclose information on said subject.

Respondent thus completely frustrated the attempts of petitioner to procure information from respondent, both before trial and during trial. Petitioner thereupon offered to prove at the trial, through an officer of the Public Utilities Commission, that, between January 1, 1958 and October 31, 1968, there were 13 accidents, involving vehicles and respondent's trains, at Crossing No. D-10-14-C, a crossing in the immediate vicinity of the area where the accident occurred (Rep. Tr. 171:8-28). Petitioner further offered to prove that 11 other such accidents occurred at the same crossing prior to January 1, 1958, seven of which occurred subsequent to 1952 (Rep. Tr. 172:5-8). Petitioner further offered to prove that, at crossing No. D-10.37-C, another crossing in the immediate vicinity of the area where the accident occurred, there were 11 such accidents, seven of which occurred since 1957 (Rep. Tr. 172:1-2, 9-13). The offer of proof then referred to three accidents that occurred at other crossings, the locations of which are unclear from the record (Rep. Tr. 172:13-17).

Thus, the offer of proof referred to at least 35 accidents that occurred in the immediate vicinity of the subject accident.

20 of which occurred since 1957.[3] Yet respondent has represented to this Court that the 34 accidents occurred "all over the Oakland Terminal" (Respondent's Brief at p. 23, footnote 7), that they date "as far back as 1928" (Respondent's Brief at p. 23)[4] and that "most of those accidents probably involved the striking of parked cars" (Respondent's Brief at p. 25).

The basic ground of the trial court's refusal to permit the proferred evidence was that the evidence dealt with automobile-train collisions (the only type of collisions as to which petitioner was able to get any information, as above noted), rather than automobile-pedestrian collisions (Rep. Tr. 138:23-139:5). However, it appears clear that if automobiles were colliding with large trains in the area, it is ample proof of notice that grave danger to smaller, less visible humans existed. We respectfully submit that, if the issue of the existence of other accidents is crucial herein, the trial court's ruling was prejudicial to

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[3] The reason our Petition referred to 34 accidents (Petition, p. 9 at footnote 3), is that several of the accidents occurred subsequent to the accident in suit.

[4] Only one of the accidents referred to occurred in 1928. All of the others occurred subequent to January 1, 1945 (Rep. Tr. 171-172).

petitioner.[5] The requirement of similarity of conditions is much relaxed when evidence of other accidents is offered to show notice of the dangerous condition. See, e.g., Hilts v. County of Solano, 265 Cal. App. 2d 161, 169. The offer of proof herein specifically was based on the ground that the proferred evidence was relevant "because it is notice of the dangerous nature of these crossings, including the crossing that went into the American Can Company . . . . ." Rep. Tr. 172:20-22.

This issue was raised and fully briefed in the California Court of Appeal. That Court accepted the proferred evidence as true, since the opinion recognizes that there were "frequent accidents in the area" (Appendix B at p. B-5). Respondent's contention to the contrary (Respondent's Brief, continuation of footnote 7 at p. 24) is thus without merit.

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[5] In view of the testimony of employee complaints, however, we do not believe there can be any question but that respondent received notice of the dangerous condition.

WITH RESPECT TO THE LAW:

As noted (footnote 2, supra), we do not believe that respondent's authorities are applicable to the case at bar. Other than the Inman case, supra, already discussed, respondent relies primarily on dictum in Simpson v. Texas & N.O. R. Co., 297 F. 2d 660 (5th Cir. 1962). Respondent seeks to deduce from that dictum a rule that, as a matter of law, a railroad has no duty to take feasible precautions to avoid exposing its employees to the hazards of jaywalking back and forth across a public street. If this is the proposition of the Simpson case, we respectfully submit that it is wrong, and is in conflict with the principles laid down by this Court and the Courts of Appeal, in the decisions cited by us, and many others. Indeed, forcing a plaintiff into danger from traffic may constitute negligence, even under the common law.

See, e.g.:

O'Neill v. City of Port Jervis, 171 N.E. 694 (N.Y. Ct. App. 1930);

Fennessy v. Pac. Gas & Elec. Co., 20 Cal. 2d 141 (1942);

Shafir v. Seben, 233 S.W. 419 (Sup. Ct. Mo. 1921);

Johnson v. City of Rockford, 182 N. E. 2d 240 (Ill. App. 1962).

This is therefore a case that requires a jury determination.

Finally, respondent relies on Mortensen v. Southern Pac. Co., 245 Cal. App. 2d 241, on the theory, apparently, that this same Court of Appeal decided that case correctly, and therefore must have decided the instant case correctly (Respondent's Brief at p. 26). We respectfully submit that the Mortensen case supports our position, and is yet another case demonstrating the error at bar. There, as here, the respondent Southern Pacific Co. contended that "the sole proximate cause of death was th criminal negligence of the drunken driver[6] . . . " 245 Cal. App. 2d at p. 245. The Court of Appeal held that "the nature of the other driver's act negates neither negligence nor proximate cause. . . . " and rejected the proposition that "the peculiar causation of the particular collision . . . " governs the issues of duty and foreseeability. 245 Cal. App. 2d at p. 245. Rather, it was "the general likelihood of

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6/ In any event, and respondent's inferences to the contrary notwithstanding (Respondent's Brief at pp. 6-7), the evidence did not establish that Mrs. Coker was drunk. See our Petition at p. 10.

automobile collisions upon the highway . . . which governed those issues. Ibid.

The same principles apply herein. It is not "the peculiar causation" of the particular accident at bar which governs the issues here, but rather "the general likelihood" that careless automobile drivers create hazards for these employees of respondent who are required by respondent to jaywalk continuously across the public streets.

CONCLUSION

The subject Petition should be granted.

Respectfully submitted,

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and

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